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14 **UNITED STATES DISTRICT COURT**  
15 **DISTRICT OF NEVADA**

17 DONNA CORBELLO, an individual  
18 Plaintiff,  
19 v.  
20 THOMAS GAETANO DEVITO, an  
21 individual, et al.  
22 Defendants.

CASE NO.: 2:08-cv-00867-RCJ-PAL

**MOTION NO. 1: MOTION BY NEW  
DEFENDANTS TO DISMISS  
COUNTS 15 THROUGH 17 OF  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT UNDER RULE  
12(b)(6); MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**[Oral Argument Requested]**

Courtroom: The Honorable  
Robert C. Jones


1 Defendants Frankie Valli, Robert J. Gaudio, Marshall Brickman, Eric S. Elice,  
2 Des McAnuff, DSHT, Inc., Dodger Theatricals, Ltd. and JB Viva Vegas, LP  
3 (collectively, the "New Defendants") move for an Order dismissing Counts 15  
4 through 17 of Plaintiff's Second Amended Complaint ("SAC") pursuant to Federal  
5 Rule of Civil Procedure 12(b)(6). The ground for the New Defendants' Motion to  
6 Dismiss Counts 15, 16, and 17 for copyright infringement is that New Defendants  
7 have been released from any copyright infringement claims arising out of Tommy  
8 DeVito's autobiography.

9  
10 This motion will be based upon the following Memorandum of Points and  
11 Authorities, the records and files in this action and such oral argument (hereby  
12 requested) as the Court may deem necessary and proper.

13  
14 DATED: April 23, 2009

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16 TODD KENNEDY  
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28 and JB VIVA VEGAS, L.P.

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# **TREATISES**

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3 M. & D. Nimmer, <u>Nimmer on Copyright</u> § 10.03[A][7] (2007 ed) .....	8

1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3            **I. INTRODUCTION**

4            This is a claim for copyright infringement or, in the alternative, a claim that  
5 Plaintiff is a co-owner of the copyrighted work, "Tommy DeVito: Then and Now"  
6 (the "Autobiography"), entitled to share in the proceeds of a "license" given to certain  
7 defendants to create the hit Broadway musical play, JERSEY BOYS. The  
8 Autobiography was registered for U.S. Copyright in 1991 by defendant Tommy  
9 DeVito, an original member of singing group, The Four Seasons, who claimed to be  
10 its sole author. Rex Woodard, a fan of The Four Seasons who died in 1991, claimed  
11 to be a co-author and co-owner of the Autobiography. Second Amended Complaint  
12 ("SAC") ¶¶ 26-35, 41, 74 & Ex. 21.

13            About a decade after the Autobiography was created, it remained unpublished  
14 as interest in The Four Seasons had waned during the 1990s. *Id.*, ¶ 37. Nevertheless,  
15 the star and the main songwriter of The Four Seasons, Frankie Valli and Bob Gaudio,  
16 respectively, had continued their efforts to produce a musical stage play about the  
17 group. In August 13, 1999, Gaudio and Valli entered into a Letter Agreement with  
18 DeVito and Rick Macioci, aka Nick Massi, the two other original members of the  
19 group (the "1999 Letter Agreement").<sup>1</sup> This document provided for a grant of life  
20 story rights from DeVito and Massi for use in a Four Seasons-related musical, an  
21 agreement by DeVito and Massi to cooperate in the creation of such a musical and an  
22 express waiver and release of all claims that could arise in conjunction with such a  
23 musical.

24            In relevant part, the 1999 Letter Agreement specifically provided that:

25

---

26            <sup>1</sup>            The 1999 Letter Agreement was attached to the SAC as Exhibit 31, pages  
27 38-41. For the Court's convenient reference, the 1999 Letter Agreement is also  
28 attached hereto as Exhibit A.

1           --        "We [Gaudio and Valli] are presently contemplating entering into an  
2 agreement which would authorize the creation of a musical stage play based on the  
3 life and music of 'The Four Seasons' (the 'Play')."

4           --        "you [DeVito and Massi] grant to us the exclusive right to use and  
5 incorporate the Materials in one or more theatrical productions..."; "Materials" is  
6 defined as "certain aspects of your life related to The Four Seasons including, by way  
7 of example, your creative contributions, biographies, events in your life, names and  
8 likenesses."

9           --        "The rights granted by you to us hereunder shall continue in perpetuity if  
10 the rights in the Play have merged with each other pursuant to the production contract  
11 between us and the initial commercial producer."

12           --        "You ... waive any claim in connection with the Materials or Works  
13 including, but not limited to, any claim that the Works libel, slander or defame you, or  
14 violate any right of privacy, publicity, confidentiality, copyright or other personal or  
15 property right."; "Works" is defined collectively as theatrical productions based on the  
16 Material and all ancillary exploitations thereof.

17           --        "... the bookwriters of the Play, or their designees, agree to interview  
18 you and you agree to make yourselves available for such interviews by the  
19 bookwriters or their designees, as they may reasonably request."

20           --        "... in no event shall you have the right to seek injunctive relief or to  
21 enjoin or restrain or otherwise interfere with the exploitation, production, distribution  
22 or exhibition of the Play or the Works."

23           --        "This agreement shall inure to our benefit and the benefit of our  
24 licensees, successors, designees and assigns."

25 Exhibit A hereto, pages 1-4 (emphasis added).

26           As expressly contemplated in the 1999 Letter Agreement, Gaudio and Valli  
27 subsequently entered into other agreements including a May 1, 2004 agreement with  
28

1 DSHT, Inc. and Dodger Theatricals Ltd., through which the musical JERSEY BOYS  
2 about The Four Seasons was produced and distributed. SAC ¶¶ 56-57.

3 Plaintiff's lawsuit alleges that JERSEY BOYS copied from the Autobiography  
4 without her authorization. On February 27, 2009, Plaintiff filed a Second Amended  
5 Complaint alleging various claims against Defendant DeVito, including breach of  
6 contract, fraud and conversion. The Second Amended Complaint also alleges various  
7 claims against defendants Gaudio, Valli, DSHT, Dodger Theatricals, JERSEY BOYS  
8 co-writers Rick Elice and Marshall Brickman, director Des McAnuff and the  
9 producing entity of the JERSEY BOYS production in Las Vegas, JB Viva Vegas, LP  
10 (collectively the "New Defendants").

11 Based on a contested claim that Woodard was a co-author of the  
12 Autobiography, and on the allegation that JERSEY BOYS copied the Autobiography,  
13 the plaintiff, Donna Corbello, Woodard's widow, alleges in her Second Amended  
14 Complaint two alternative theories for recovery. Either: (1) the 1999 Letter  
15 Agreement must be viewed as an attempt by DeVito to transfer to Gaudio/Valli  
16 exclusive rights (i.e., 100% of the rights) in the copyright in the Autobiography, which  
17 Plaintiff asserts DeVito could not effectively transfer because of Plaintiff's claim that  
18 DeVito only owned 50% of the copyright, and thus the transfer was *void ab initio*; or  
19 (2) in the alternative, the 1999 Letter Agreement constituted an assignment to  
20 Gaudio/Valli of all of DeVito's ownership interest (according to Plaintiff, 50%) in the  
21 Autobiography, making Gaudio/Valli 50% co-owners in the Autobiography with  
22 Plaintiff owning the remaining 50% interest -- assuming Plaintiff is a co-owner of the  
23 rights in the licensed Autobiography -- and entitling Plaintiff to an accounting of all  
24 proceeds from the Autobiography, including from JERSEY BOYS.<sup>2</sup>

25  
26  
27 <sup>2</sup> These two theories of recovery did not become clear until Plaintiff filed  
28 her Second Amended Complaint and expressly delineated her copyright and non-  
copyright infringement claims.



1 Plaintiff's first theory is the foundation for her Counts 15-17 for copyright  
2 infringement under U.S. law because she argues that without a valid license to the  
3 Autobiography from DeVito, the New Defendants have infringed the copyright in the  
4 Autobiography. Plaintiff's second theory is the basis for her Counts 13-14, non-  
5 copyright claims for alternative declaratory relief and an accounting, which are  
6 alleged only against Valli, Gaudio, DSHT and Dodger Theatricals.<sup>3</sup>

7 The New Defendants vigorously deny that any of them copied any  
8 copyrightable material from the Autobiography in creating JERSEY BOYS and  
9 further deny that they needed a license to that Autobiography from DeVito or anyone  
10 else to produce the play.<sup>4</sup> They nevertheless bargained for the provisions of the 1999  
11 Letter Agreement (including the life story rights license and copyright infringement  
12 release) and are entitled to rely upon that document in defense of this lawsuit brought  
13 by the alleged co-author of DeVito's Autobiography.

14 The New Defendants seek dismissal under Rule 12(b)(6) of Counts 15-17 for  
15 U.S. copyright infringement of the Autobiography on the well-established rule in the  
16 Ninth Circuit that a co-owner of a copyright, such as plaintiff alleges DeVito was in  
17 1999, may grant a non-exclusive license which protects the grantee from a claim of  
18 infringement. *Oddo v. Ries*, 743 F.2d 630, 633 (9<sup>th</sup> Cir. 1984). Ninth Circuit law also  
19 provides that even a failed attempt to grant an exclusive license, as a matter of law,  
20 may constitute a grant of a non-exclusive license and that such license can extend to  
21 the grantee's assignees. *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558 (9<sup>th</sup> Cir.  
22 1990).

---

23  
24  
25 <sup>3</sup> Those defendants have separately moved for dismissal of Counts 13-14  
26 in Motion to Dismiss No. 3 filed concurrently herewith.

27 <sup>4</sup> All of the New Defendants join in the Motion to Dismiss No. 2 brought  
28 by the writers, directors and producers of JERSEY BOYS on the ground that no  
copyrightable portions of the Autobiography were used in JERSEY BOYS.

1 **II. PLAINTIFF MAY NOT STATE COPYRIGHT INFRINGEMENT**  
 2 **CLAIMS ARISING OUT OF THE DEVITO AUTOBIOGRAPHY**  
 3 **BECAUSE A JOINT OWNER OF THAT WORK WAIVED AND**  
 4 **RELEASED ALL COPYRIGHT CLAIMS RELATED THERETO, AND**  
 5 **HAS EXPRESSLY AND IMPLIEDLY CONSENTED TO ITS USE**

6  
 7 **A. In the 1999 Letter Agreement, Alleged Copyright Joint Owner**  
 8 **DeVito Expressly Waived and Released Any Right to Sue Based on**  
 9 **Copyright Infringement Or Any Other Claim Against JERSEY**  
 10 **BOYS**

11 Plaintiff attached as part of Exhibit 31 of her Second Amended Complaint and  
 12 extensively referenced in that pleading the 1999 Letter Agreement between DeVito,  
 13 Massi, Gaudio and Valli. As such, the Court may consider the 1999 Letter Agreement  
 14 on this motion to dismiss: “A court may consider evidence on which the complaint  
 15 ‘necessarily relies’ if (1) the complaint refers to the document; (2) the document is  
 16 central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy  
 17 attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.2d 445, 448 (9<sup>th</sup> Cir. 2006).  
 18 *Id.* (“The court may treat such document as ‘part of the complaint, and thus may  
 19 assume that its contents are true for purposes of a motion to dismiss under Rule  
 20 12(b)(6)’.”) (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9<sup>th</sup> Cir. 2003)). *See*  
 21 *also Ernestberg v. Mortgage Investors Group*, \_\_F.Supp.2d \_\_, 2009 WL 160241, \*3  
 22 (D.Nev. Jan 22, 2009) (“[D]ocuments whose contents are alleged in a complaint and  
 23 whose authenticity no party questions, . . . may be considered in ruling on a Rule  
 24 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion  
 25 for summary judgment).

26 The 1999 Letter Agreement provides, on its face, that DeVito will “waive any  
 27 claim,” including claims for copyright infringement, in connection with a proposed  
 28 theatrical musical about The Four Seasons and “any ancillary and subsidiary

1 exploitations thereof including, without limitation, cast albums, motion picture and  
 2 televised versions, merchandise and/or other works (collectively 'Works').” (Exhibit  
 3 A hereto, at 2-3.)

4 Plaintiff admits, as she must, that DeVito has waived any claim for copyright  
 5 infringement arising in any way out of JERSEY BOYS: “The Agreement included a  
 6 waiver by Defendant DeVito of any and all claims that the use and/or adaptation of  
 7 such ‘Materials’ [including DeVito’s ‘biographies’] would violate any copyrights  
 8 therein . . . .” SAC ¶54. Thus, even assuming *arguendo* that JERSEY BOYS copied  
 9 copyrightable material<sup>5</sup> from the Autobiography -- which New Defendants deny -- an  
 10 alleged joint copyright owner of the Autobiography (DeVito) has waived any  
 11 infringement claim against JERSEY BOYS.

12 **B. The New Defendants Have a Consent Equivalent To A Non-**  
 13 **Exclusive License From DeVito To Use the Autobiography in**  
 14 **JERSEY BOYS and They Have a Release That Accrues To**  
 15 **Their Benefit**

16 As discussed above, in the 1999 Letter Agreement, DeVito expressly released  
 17 Valli and Gaudio from any claim in connection with JERSEY BOYS or any ancillary  
 18 works, including claims for copyright infringement. On its face, the 1999 Letter  
 19 Agreement also expressly acknowledges that Valli and Gaudio will be entering into  
 20 additional agreements authorizing and licensing others to write, produce and exploit  
 21 the musical that ultimately became JERSEY BOYS.

22 Thus, when he entered into the 1999 Letter Agreement, DeVito understood and  
 23 agreed that he was releasing any claims he might have, including any copyright  
 24 claims, arising out of the musical play that ultimately became JERSEY BOYS, and  
 25

26  
 27 <sup>5</sup> Biographical and historical facts, as well as other facts, are not protected  
 28 by copyright law. *Narrel v. Freeman*, 872 F.2d 907 (9<sup>th</sup> Cir. 1989); 17 U.S.C. §  
 102(b).

1 that his release would extend beyond Valli and Gaudio to the benefit of those who  
2 would be involved in writing, producing and exploiting JERSEY BOYS.

3 Consistent with this, Plaintiff's Second Amended Complaint alleges that  
4 DeVito's entry into the 1999 Letter Agreement resulted in DeVito becoming a  
5 financial participant in JERSEY BOYS and receiving a royalty percentage of revenues  
6 from the exploitation of the Play. SAC ¶¶ 46, 54. DeVito's Answer admits he is  
7 aware of JERSEY BOYS and gets a percentage of the profits therefrom. DeVito's  
8 Answer to SAC, filed 3/11/09, ¶¶ 46, 54.

9 Accordingly, based on the pleadings, which incorporate the 1999 Letter  
10 Agreement, DeVito has consented to the use of the Autobiography in JERSEY BOYS  
11 by all of the New Defendants and has ratified such use by participating in the show's  
12 financial success. But if, as alleged by Plaintiff, DeVito was a joint owner with  
13 Plaintiff of the copyright to the Autobiography, DeVito could not grant an exclusive  
14 license in the Autobiography. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d  
15 1137, 1145-46 (9<sup>th</sup> Cir. 2008). DeVito could, however, grant a non-exclusive license  
16 to the Autobiography, either expressly or impliedly through his conduct. Indeed,  
17 DeVito's entry into the 1999 Letter Agreement and his subsequent, admitted conduct  
18 of accepting royalty checks from the producers of JERSEY BOYS, must be regarded  
19 as equivalent to a non-exclusive license to the New Defendants. *Id.* at 1146 (even  
20 though license agreement purports to transfer exclusive rights to Sybersound, because  
21 Sybersound's licensor was only a co-owner of the copyright, the agreement is deemed  
22 to have licensed only non-exclusive rights); *Effects Associates, Inc. v. Cohen*, 908  
23 F.2d at 558 ("A non-exclusive license may be granted orally, or may even be implied  
24 from conduct.") (quoting 3 M. & D. Nimmer, Nimmer on Copyright § 10.03[A] at 10-  
25 36 (1989 ed.), now § 10.03[A][7] at 10-49 (2007 ed.) ("Nimmer").

26 *Effects* is instructive. In that case, defendant Cohen produced a movie and  
27 asked plaintiff to create special effects footage for the film. Plaintiff did but Cohen  
28 was dissatisfied and paid only part of the originally agreed-upon price. Plaintiff sued

1 for copyright infringement, claiming that copyright to plaintiff's footage did not  
2 transfer to Cohen unless and until he paid the full price. The district court granted  
3 summary judgment to Cohen and co-defendant New World, the movie's distributor.  
4 The Ninth Circuit affirmed in an opinion by Judge Kozinski, holding that although  
5 there was no writing, required by Section 204(a) of the Copyright Act to transfer to  
6 the defendants the entire copyright or any exclusive right in plaintiff's footage, as a  
7 matter of law, the facts supported the existence of a non-exclusive license in  
8 defendants' favor. Importantly, the panel held that because plaintiff understood that  
9 its footage would be incorporated by Cohen into a movie and that the movie would  
10 then be released by a distributor, the non-exclusive license extended not only to the  
11 defendant (Cohen) with whom plaintiff was in privity, but also to the defendant film  
12 distributor. 908 F.2d at 559. So it is here. The 1999 Letter Agreement itself recites  
13 that DeVito's grant is intended to benefit Valli's and Gaudio's "licensees, successors,  
14 designees and assigns." (Ex. A, at 4.)

15 More recently, in *Field v. Google Inc.*, 412 F.Supp.2d 1106, 1115-16 (D.Nev.  
16 2006), Judge Jones specifically cited with approval *Effects* and *Nimmer* for the  
17 proposition that "[a] copyright owner may grant a non-exclusive license expressly and  
18 impliedly through conduct." The court went on to find that "consent to use the  
19 copyrighted work need not be manifested verbally and may be inferred based on  
20 silence where the copyright holder knows of the use and encourages it." *Id.* at 1116,  
21 citing *Keane Dealer Services, Inc. v. Harts*, 968 F.Supp. 944, 947 (S.D.N.Y. 1997)  
22 ("Consent given in the form of mere permission or lack of objection is also equivalent  
23 to a non-exclusive license.") (emphasis added); *Quinn v. City of Detroit*, 23 F.Supp.2d  
24 741, 753 (E.D. Mich. 1998).

25 DeVito's actions of entering into the 1999 Letter Agreement knowing that the  
26 Autobiography could be used not only by Valli and Gaudio but also by the writers,  
27 producers and distributor of JERSEY BOYS, and of accepting royalty checks from the  
28 producers for the exploitation of JERSEY BOYS (as Plaintiff has alleged), constitute



1 the grant of consent equivalent to a non-exclusive license to the New Defendants to  
2 use the Autobiography in JERSEY BOYS.

3 **C. Because One Joint Owner of a Copyright Can Release Claims**  
4 **Arising Out of the Copyrighted Autobiography and/or Grant a Non-**  
5 **Exclusive License Thereto, the New Defendants Are Immunized**  
6 **From Any Copyright Infringement Claim That Could Be Brought**  
7 **By Alleged Joint Owner Corbello**

8 Because all of the New Defendants have a consent equivalent to a non-  
9 exclusive license from DeVito to use the Autobiography in JERSEY BOYS, Plaintiff  
10 has no valid copyright infringement claim against the New Defendants. *Meredith v.*  
11 *Smith*, 145 F.2d 620, 621 (9<sup>th</sup> Cir. 1944) (a “co-owner had the right to give  
12 permission” for non-exclusive use of a copyrighted work); *Batiste v. Island Records*,  
13 179 F.3d 217, 224 (5<sup>th</sup> Cir. 1999) (“An authorization to the defendant from one joint  
14 owner will be an effective defense to an infringement action brought by another joint  
15 owner.”); *McKay v. Columbia Broadcasting Systems, Inc.*, 324 F.2d 762, 763 (2<sup>nd</sup> Cir.  
16 1963) (“[A] license from a co-holder of a copyright immunizes the licensee from  
17 liability to the other co-holder for copyright infringement.”); *Piantadosi v. Loew’s,*  
18 *Inc.*, 137 F.2d 534, 537 (9<sup>th</sup> Cir. 1943) (a third party granted a non-exclusive copyright  
19 license by one co-owner had no duty to the other co-owner) (affirming summary  
20 judgment to defendant licensee); 1 *Nimmer* § 6.10[A] at 6-35.

21 The 1999 Letter Agreement and other admissions in the pleadings discussed  
22 above are fatal to Plaintiff’s copyright infringement claims against the New  
23 Defendants. As such, Plaintiff’s Counts 15-17 of the Second Amended Complaint  
24 must be dismissed. *See Marder v. Lopez*, 450 F.3d at 452-53 (affirming defendants’  
25 motion to dismiss plaintiff’s copyright infringement claims due to broad release that  
26 was attached to plaintiff’s complaint). If Plaintiff has any claim at all, it would be  
27 against alleged joint copyright holder DeVito whom Plaintiff might contend should  
28 account to Plaintiff for any royalties DeVito obtained from the exploitation of the


1 account to Plaintiff for any royalties DeVito obtained from the exploitation of the  
 2 Autobiography. *See Oddo v. Ries*, 743 F.2d at 633 (A co-owner of a copyright has a  
 3 duty to account to the other co-owner); *Hustlers, Inc. v. Thomasson*, 253 F.Supp.2d  
 4 1285, 1290 (N.D. Ga. 2002) (plaintiff co-owner's remedy is to seek an accounting  
 5 against its co-owner; plaintiff has no infringement action against a licensee of the  
 6 allegedly wrongdoing co-owner).

### 8 **III. CONCLUSION**

9 Plaintiff's claims for copyright infringement under U.S. law (Counts 15-17)  
 10 depend on her contention that JERSEY BOYS infringed her alleged 50% copyright  
 11 interest in the DeVito Autobiography and that the New Defendants have no license to  
 12 use that Autobiography. Even assuming *arguendo* that JERSEY BOYS copied  
 13 elements from the Autobiography that were copyrightable -- the subject of Motion No.  
 14 2 -- Counts 15-17 cannot state a valid claim because the New Defendants have a  
 15 consent, equivalent to a non-exclusive license, from DeVito, whom Plaintiff alleged is  
 16 a co-owner of the copyright to the Autobiography. As non-exclusive licensees from a  
 17 co-owner of the allegedly infringing work, the New Defendants are immunized from  
 18 any claim by Plaintiff, the alleged other co-owner of that work.

19 Motion No. 1 should be granted and Plaintiff's Counts 15, 16 and 17 should be  
 20 dismissed with prejudice.

21  
 22  
 23 DATED: April 23, 2009

  
 DANIEL M. MAYEDA  
 LEOPOLD, PETRICH & SMITH  
 A Professional Corporation  
 Attorneys for Defendants  
 FRANKIE VALLI, ROBERT J.  
 GAUDIO, MARSHALL BRICKMAN,  
 ERIC S. ELICE, DES McANUFF, DSHT,  
 INC., DODGER THEATRICALS, LTD.  
 and JB VIA VEGAS L.P.

**EXHIBIT A**



PAGE 09

212 308 0084

**EXECUTED**

AUG 13 1999 16:51

EXHIBIT A

Robert Gaudio and Frankie Valli  
c/o Peter C. Bennett, Esq.

Beverly Hills, California 90210

Dated as of \_\_\_\_\_, 1999

Mr. Nicholas Macioci  
West Orange, New Jersey 07052

Mr. Thomas Devito  
c/o J.R. Reilly  
Henderson, Nevada 89014

Re: "The Four Seasons"

Dear Nicky and Tommy:

For One Dollar (\$1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

We are presently contemplating entering into an agreement which would authorize the creation of a musical stage play based on the life and music of "The Four Seasons" (the "Play"). In connection with the Play, the authors of the play may wish to use or incorporate certain aspects of your life related to The Four Seasons including, by way of example, your creative contributions, biographies, events in your life, names and likenesses (the "Materials"). In consideration of our right to use such Materials, as more fully set forth below, you shall be entitled to the following:

(a) One-fourth (i.e., 25%) of the royalty actually paid specifically for the underlying rights as a whole ("Your Royalty Share"), subject to the same waivers, deferrals and royalty pool calculations as are applicable to us in our capacity as underlying rights holders, provided we shall not enter into an agreement for the underlying rights in which the royalty allocated to underlying rights is less than one-third the aggregate royalty allocated to the book, music and lyrics of the Play without your approval. By way of example only, if 6% of the gross weekly box office receipts ("GWBOR") is paid for

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the book, music and lyrics of the Play, the underlying rights shall receive no less than 2% thereof, and you shall be entitled to receive 0.5% thereof. By way of further example, if the book, music and lyrics are allocated 15.6% of weekly operating profits in a royalty pool, the underlying rights shall be allocated no less than 5.2% thereof, and you shall be entitled to receive 1.3% thereof. Your Royalty Share shall be divided between you as follows: 80% to Thomas Devito and 20% to Nicholas Macioci. You will further be entitled to one-fourth of the subsidiary rights income payable to us in our capacity as underlying rights holder, which amount shall be divided between you in the same ratio as applicable to the royalty, provided we shall not enter into an agreement in which the author's share of subsidiary rights allocated to underlying rights is less than one-fourth the entire author's share without your approval. By way of example only, if the author's share of stock and amateur advances is \$600,000 (net of agency fees and commissions), underlying rights shall receive no less than \$150,000 thereof, and you shall be entitled to receive \$37,500 thereof. You shall not be entitled to share in subsidiary rights income derived from the Play or in royalties paid or received for any purpose other than in connection with the underlying rights (such as royalties which may be paid for writing services, or for music or lyrics):

(b) One-fourth (i.e., 25%) of the advance actually paid specifically for the underlying rights, to be divided equally between you. By way of example only, if a \$30,000 advance is paid for the underlying rights, you shall receive \$3,750 each. You shall not be entitled to share in monies paid or received for any purpose other than the underlying rights;

(c) \$10,000 of the advance actually paid specifically for underlying rights, such advance to be paid entirely to Nicholas Macioci.

In consideration of the foregoing payments, you grant to us the exclusive right to use and incorporate the Materials in one or more theatrical productions, and any and all ancillary and subsidiary exploitations thereof including, without limitation, cast albums, motion picture and televised versions, merchandise and/or other works (collectively, "Works"). We shall further have the right to use the Materials in the advertising, publicity and promotion of the Works. You hereby consent to any such use

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and agree that the Works may be exploited throughout the world in all media now existing or later devised, and you further acknowledge that you will not receive any compensation for the use of the Materials or in connection with any of the Works other than the compensation expressly set forth herein. The rights granted by you to us hereunder shall continue in perpetuity if the rights in the Play have merged with each other pursuant to the production contract between us and the initial commercial producer. If the rights of the initial commercial producer lapse prior to merger, and we enter into a production contract with another commercial producer within two (2) years following such lapse of rights, our rights hereunder shall continue only for the duration of such subsequent producer's rights, and in perpetuity if merger has occurred pursuant to our production contract with such subsequent producer.

Without limitation of the foregoing, we shall have the right, but not the obligation, to use the Materials in any manner which we see fit including, without limitation: to depict you or create or develop a character or characters based on you either in whole or in part; to dramatize and/or fictionalize events and incidents in your life and the manner in which you are depicted; to use, change, adapt or elect not to use the Materials as we may determine; and to make any other changes to the Materials and the Works as we may, in our sole discretion, deem appropriate.

You waive any right to inspect or approve the Works or any use of the Materials in connection therewith. You further waive any claim in connection with the Materials or Works including, but not limited to, any claim that the Works libel, slander or defame you or violate any right of privacy, publicity, confidentiality, copyright or other personal or property right.

In addition to the foregoing, the bookwriters of the Play, or their designees, agree to interview you, and you agree to make yourselves available for such interviews by the bookwriters, or their designees, as they may reasonably request.

The rights granted to us herein are irrevocable, and not subject to rescission or injunction under any circumstances. In the event of a breach by us, your sole remedy shall be an action at law for damages actually

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suffered; in no event shall you have the right to seek injunctive relief or to enjoin or restrain or otherwise interfere with the exploitation, production, distribution or exhibition of the Play or the Works.

We shall have the unrestricted right to assign this agreement in whole or in part. This agreement shall inure to our benefit and the benefit of our licensees, successors, designees and assigns. It shall be binding upon you, your heirs, executors, administrators, representatives and assigns and shall be governed by the laws of the State of New York.

This agreement is intended to expand and not limited the rights granted to us pursuant to previous agreements between the parties. You acknowledge there are no assurances that the Play will be produced or that any royalties, subsidiary rights income or other monies will be received by us and paid to you. You further acknowledge that, other than as expressly set forth herein, no promises have been made to you, nor have you relied on any prior representations in entering into this agreement.

If the foregoing is acceptable, please countersign this letter where indicated.

very truly yours,

Frankie Valli

*Frankie Valli*  
Frankie Valli

AGREED AND ACCEPTED:

*Nicholas Macioci*  
Nicholas Macioci

*Thomas DeVito*  
Thomas DeVito

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274.**

On April 23, 2009, I served the foregoing document described as **MOTION NO. 1: MOTION BY NEW DEFENDANTS TO DISMISS COUNTS 15 THROUGH 17 OF PLAINTIFF'S SECOND AMENDED COMPLAINT UNDER RULE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action.

☒ by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

**SEE ATTACHED SERVICE LIST**

☒ **BY REGULAR MAIL:** I deposited such envelope in the mail at 2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY FACSIMILE MACHINE:** I transmitted a true copy of said document(s) by facsimile machine, and no error was reported. Said fax transmission(s) were directed as indicated on the service list.

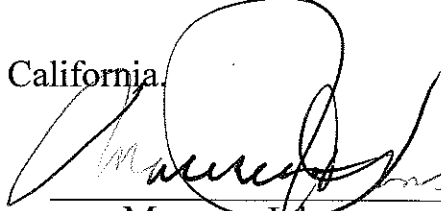
☐ **BY ELECTRONIC MAIL:** I transmitted a true copy of said document(s) by electronic mail, and no error was reported. Said electronic mail(s) were directed as indicated on the service list.

☐ **BY OVERNIGHT MAIL:** I deposited such documents at the Federal Express Drop Box located at 2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274. The envelope was deposited with delivery fees thereon fully prepaid.

☐ **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 23, 2009, at Los Angeles, California.

  
Maureen Johnson

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